Filed 2/11/19 P. v. Mejia CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PEDRO ORELLANA MEJIA, Defendant and Appellant.	A154089 (Marin County Super. Ct. No. SC202086)

Defendant Pedro Orellana Mejia appeals from a judgment following his plea of guilty to one count of misdemeanor battery with serious bodily injury (Pen. Code, § 243, subd. (d)).[1] He contends the trial court abused its discretion in denying his motion to withdraw his plea based on his attorney's asserted failure to discover certain exculpatory information prior to his plea. Alternatively, he maintains he received ineffective assistance of counsel. We affirm.

BACKGROUND[2]

San Rafael Police Officer Travis Ruggles received a dispatch of "a group of subjects fighting in the street." Upon his arrival at the scene, "the subjects . . . dispersed." However, he made contact with two young men, J.L. and K.M. J.L. said he had seen the fight and more than six individuals were involved.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Because the conviction was based on a plea, the factual background is taken from the preliminary hearing transcript.

Officer Ruggles next contacted the individual who had reported the altercation. That individual, the manager of the apartment complex in front of which the fight occurred, told Officer Ruggles she had seen multiple individuals "hitting each other" and one of the individuals had used a bed frame to strike the victim. Although she originally provided no description of this person to dispatch, she later described him to Officer Ruggles as wearing a "white colored polo shirt with black or gray stripes and blue jeans with a black baseball cap." She also said she had seen him talking to an African-American police officer. There is only one African-American police officer with the San Rafael Police Department, Officer Elisha Adams. Upon learning that the suspect had previously spoken to Officer Adams, Officer Ruggles broadcast this information over the radio, along with the suspect description the manager had provided.

Officer Adams, who also responded to the initial dispatch, parked some distance away from the scene of the disturbance and approached on foot in order to catch anyone "fleeing the area." As he approached, he saw defendant, who he recognized. Officer Adams stated defendant was wearing a backwards baseball cap, a blue, white and gray stripped polo shirt, and black or dark-colored jeans. Defendant was on a bike, out of breath, and "his eye had some swelling." Officer Adams told defendant to wait and get down on the ground. Defendant did not comply, asserting he was not involved and had done nothing wrong. Officer Adams decided not to pursue defendant and instead went back to assist Officer Ruggles.

By that time, the additional dispatch relaying the manger's description and the information the suspect had been seen earlier talking to an African-American officer had been broadcast. Officer Adams, realizing this was referring to defendant, went to "contact the defendant a second time." He found defendant nearby, after a "30-second drive." Between Officer Adam's first and second contact, approximately 10 minutes had elapsed.

About two hours after he first responded to the scene, Officer Ruggles went to Marin General Hospital to speak with the victim, who was in a hospital bed and had suffered a two-inch laceration on his forehead and an abrasion on his right arm. The

victim said he was approached by four to five individuals as he was walking alone down the street. These individuals began a fight, and one of them struck him "with a metal object," although he was not able to recall what it was. Someone also tried to grab his cell phone. The victim was able to get away, and then with the assistance of a friend, went home and later to the hospital. The victim could not identify any of the assailants.

Officer Ruggles then returned to the scene and located the blood-stained bedframe. He took a photograph, and the manager identified the frame as the one used in the fight. Neither defendant's fingerprints nor his DNA was found on the frame.

The district attorney filed a complaint alleging three counts: felony assault with a deadly weapon (§ 245, subd. (a)(1)—count 1), misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)—count 2) and misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)—count 3). As to count 1, it was further alleged defendant had suffered a prior felony strike (§§ 1170.12, subds. (a)–(d), 667, subds. (b), (i)). Defendant pleaded not guilty to all counts.

Four days before the preliminary hearing, the prosecutor advised that the district attorney was not going to strike the defendant's juvenile strike. That same day, defendant's trial counsel e-mailed the prosecutor with a "proposed resolution of a misdemeanor Penal Code section 243(d) with less than 180 days." The proposed resolution was not accepted, and the preliminary hearing went forward. The trial court ruled there was sufficient evidence to hold defendant to answer on the felony assault count, and certified the two misdemeanor counts to the superior court.[3]

After the preliminary hearing, defense counsel once again e-mailed the prosecutor with a proposed disposition of a "misdemeanor PC 243(d) with less than 180 days and a

[3] San Rafael Police Officer Remington Stobo also testified at the preliminary hearing that when he searched defendant he found a "bulbous glass pipe that had white residue" and based on his training and experience the pipe was used for methamphetamine. Defendant was searched again at jail, and Officer Stobo found "a clear plastic baggy containing a white crystalline substance" in defendant's sock which, based on Officer Stobo's training and experience, he believed was methamphetamine. The substance later tested positive for methamphetamine.

clean amended complaint." Counsel cited to the fact that the manager witness was not very reliable, as she had a prior arrest record, which included an arrest "for perjury and conviction for welfare fraud, based in part on the submission of fraudulently altered documents," she was 150 feet away from the incident, said "that she would not be able to identify anybody involved in the incident," and that when she first called 911 she did not remember anyone's clothing and when she did describe the clothing she "did not say that the man with the striped shirt and black cap hit another man with a bed frame." Counsel further pointed out that the victim could not identify defendant. He also included a letter from his investigator, Investigator Lopez, who had interviewed the manager witness. In the interview, the witness said "the scene was somewhat chaotic," but she saw a "young man . . . wearing a white polo shirt with gray stripes, a dark colored cap and dark colored jeans" hit the victim with a bed frame. However, she repeatedly "emphasized" that she would not be able to identify anyone from the incident. Indeed, the next day, she called Investigator Lopez to again tell him she could not identify the perpetrators.

"[I]n reliance on the terms of the proposed resolution," the district attorney filed an information charging defendant with one count each of misdemeanor battery with serious bodily injury (§ 243, subd. (d)), misdemeanor possession of drug paraphernalia and misdemeanor possession of methamphetamine. On October 10, 2017, defendant pleaded guilty to count 1 pursuant to an *Alford/West* plea,[4] and the remaining counts were dismissed (§ 1385). That same day, the trial court suspended imposition of sentence and placed defendant on three years' informal probation.

Four months later, while in ICE custody, defendant, represented by new counsel, filed a motion to withdraw his guilty plea (§ 1018). Defendant asserted good cause existed to grant the motion because his new attorney's investigator, Investigator Thompson, had interviewed not only the manager witness, but also K.M. and J.L., and discovered additional exculpatory information.

---

[4] *North Carolina v. Alford* (1970) 400 U.S. 25; *People v. West* (1970) 3 Cal.3d 595.

When Investigator Thompson spoke with the manager witness, she stated she was "only fifty percent sure that [defendant] was the correct person," and described defendant as " '5'2" and 5'3" tall' "[5] and wearing a " 'black hat and a black and white striped Polo shirt, but there could have been guys dressed similar.' " The witness told Investigator Thompson, " 'It could have been someone else. . . . I'm sure he was around there, but I'm not sure at all that he was the one with the bed frame. I don't want nobody to go down for something they didn't do! In my mind I remember somebody with a red sweatshirt, and it could have been him who grabbed the bed frame and hit the guy.' "

When Investigator Thompson interviewed K.M., he said he was standing near defendant when the fight happened, and defendant had not hit the victim with the bed frame.

Investigator Thompson next spoke to J.L., who "stressed that [defendant] was not involved in the fight" and said someone "wearing 'rojo ropas [red clothes]' " hit the victim with the bed frame. He also "recalled that most of the guys in the fight were Norteños and were all 'dressed in red.' "

Defendant's trial counsel declared he had asked Investigator Lopez to interview J.L. and K.M. However, to counsel's "knowledge he was unable to do so."

Defendant claimed that had he known the manager witness "was only fifty percent certain about her identification of him, and that in her mind it was possible that a man with a red sweat shirt had actually been the person who committed the crime," or known that K.M. "was a witness who would completely exonerate him," he never would have "taken the plea in this case."

The prosecution opposed defendant's motion to withdraw his plea, asserting defendant and his trial counsel had chosen to pursue a "time-not-waived" strategy in a case where the defendant was charged with a strike and with a strike prior, and at best defendant was now saying that had they "had longer and pursued a different strategy they

[5] At the hearing on the motion to withdraw the plea, counsel asked that defendant stand up and stated, "He is not five two or five three, your Honor. He is taller than that. The police report says five eight." The trial court responded, "He is not five eight."

may have had different witnesses and/or more statements by which to impeach" the manager witness. In short, the People maintained that "[d]efendant pursued a reasonable strategy alongside a talented defense counsel and obtained his desired result, a misdemeanor disposition in a case where the Defendant was charged with a strike and a strike prior. The fact that a different talented defense counsel with a different time table and tactical choices is shedding a different light on the case with the benefit of hindsight does not equate to ineffective assistance of counsel nor to clear and convincing evidence as to why justice would best be served by allowing him to withdraw his guilty plea."

The trial court denied the motion, stating, "it was clear on the record presented that this was a circumstantial case and that it was a weak case for the People." The disposition was not forced by the People. Indeed, "defense counsel[,] and I have to assume with the consent and understanding of his client[,] negotiated with the People, [and] made an offer." The court observed it was clear from the outset that "this was a melee in which there were at least 15 young men involved," the manager witness could not identify defendant, and that from the description given, it "may or may not actually be of the defendant." Further, J.L. and K.M. were not unknown witnesses; they were mentioned at the preliminary hearing and interviewed at the scene. Thus, the trial court found that "[s]trategically . . . there was a basis for soliciting the People—asking for a resolution of this case, which was significantly more favorable to the defendant in going to trial on a very serious felony with a strike allegation."

Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

DISCUSSION

Motion to Withdraw Plea

Defendant contends the trial court abused its discretion in denying his motion to withdraw his guilty plea because he entered the plea "unaware of exculpatory evidence that likely would have produced a more favorable outcome in his case."

Section 1018 provides, in pertinent part: "On application of the defendant at any time before judgment or within six months after an order granting probation is made if

entry of judgment is suspended, the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn. . . .' " "Under section 1018, '[m]istake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence.' " (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1466 (*Simmons*).)

Although this section is to be liberally construed, the withdrawal of a plea rests in the sound discretion of the trial court and a denial may not be disturbed unless the trial court has abused its discretion. (*People v. Patterson* (2017) 2 Cal.5th 885, 894.)

Defendant relies on *People v. Ramirez* (2006) 141 Cal.App.4th 1501 (*Ramirez*). In that case, the defendant pleaded no contest to one count of armed robbery and one count of evading arrest, and the remaining counts for carjacking and unlawful driving were dismissed. (*Id.* at p. 1503.) Prior to sentencing, defense counsel learned of a supplemental police report recounting, among other things, that a witness had approached several officers and told them another person had committed the carjacking. (*Id.* at pp. 1504–1505, 1507.) Observing that "[t]he fact that the new information did not uncontrovertibly exonerate appellant [was] beside the point," the appellate court concluded that the "supplemental report identified new defense witnesses, potentially reduced appellant's custody exposure, and provided possible defenses to several charges." (*Id.* at p. 1508.) The defendant had therefore "established by clear and convincing evidence that the prosecution's withholding of favorable evidence affected his judgment in entering his plea, rendering the waiver of rights involuntary." (*Id.* at pp. 1507–1508.)

Defendant's reliance on *Ramirez* as "illustrative" is misplaced. Unlike in *Ramirez*, where the prosecution withheld a supplemental police report containing information that identified new witnesses and possible defenses, here defendant knew the identity of the principal witnesses—the manager and J.L. and K.M. The latter were mentioned at the preliminary hearing, in the police report, and in defendant's trial counsel's declaration attached to the motion to withdraw the plea. Further, defendant knew the relative strengths and weaknesses of his case. As noted by the trial court, "it was clear on the

record presented that this was a circumstantial case and that it was a weak case for the People." In his e-mail offering the "proposed resolution," defense counsel pointed out that the manager witness could not identify defendant, that she was at least 150 feet away from the fight, that her prior arrest record might weaken her credibility, that she had not identified the clothing to police officers on her initial call, and that the victim, himself, could not identify defendant. In fact, the manager witness had called defendant's investigator after their interview to "emphasize[]" she would not be able to identify anyone involved in the incident. Defendant also knew at least 15 people were alleged to have been involved in the fight and that his DNA and fingerprints were not found on the bed frame. Thus, the state of defendant's knowledge of his case differed *markedly* from that of the defendant in *Ramirez.*

The Attorney General, in turn, relies on *People v. Watts* (1977) 67 Cal.App.3d 173 (*Watts*) and *People v. Breslin* (2012) 205 Cal.App.4th 1409 (*Breslin*).

In *Watts, supra*, 67 Cal.App.3d 173, the defendant appealed from the denial of his motion to withdraw a guilty plea to second degree murder. (*Id.* at pp. 176–177.) After turning down defense counsel's request to negotiate a plea, the prosecutor informed counsel that defendant's codefendant Fontaine had decided to plead guilty and would testify against defendant and a third codefendant Maxey. "The prosecutor then stated that he would attempt to get approval of a plea bargain with [defendant] under which [he] would plead guilty to second degree murder," an offer to which the defendant agreed. (*Id.* at p. 177.) Later, Maxey was acquitted at his trial, and while Fontaine testified, he did not implicate defendant. On appeal, the defendant claimed he was operating under a mistake of fact when he entered his plea because "he had overestimated the strength of the state's case against him, and had assumed that his codefendant . . . would implicate him if the case went to trial." (*Id.* at p. 183.) The appellate court ruled "[t]his is hardly the type of mistake, ignorance or inadvertence which would permit the withdrawal of a guilty plea." (*Ibid.*)

Defendant maintains *Watts* is distinguishable because it "did not involve any of the late-emerging, objective evidence that casts great doubt upon appellant's guilt in the

case at bar." However, as we have discussed above, defendant knew the circumstantial nature of the case against him and knew the relative strengths and weaknesses of the People's evidence. That he chose to enter into what appeared to be a favorable disposition at the time and now regrets it because the testimony of witnesses about which he already knew evolved over time, does not evidence the good cause required to allow the withdrawal of a plea, let alone establish that the trial court abused its discretion in denying his motion. (See *Simmons, supra*, 233 Cal.App.4th at p. 1466 ["it is settled that good cause does not include mere 'buyer's remorse' regarding a plea deal"].)

In *Breslin, supra*, 205 Cal.App.4th 1409, the victim reported to police that the defendant had become intoxicated and assaulted him in their home. The defendant denied drinking or injuring the victim, and further claimed the victim's wounds were self-inflicted and that she, herself, had been the true victim. (*Id.* at p. 1413.) Pursuant to a negotiated disposition, the defendant pled guilty to one count of corporal injury to a spouse and the remaining charges of misdemeanor disobeying a domestic order, resisting arrest, and public intoxication were dismissed. (*Id.* at p. 1414.) Prior to sentencing, the victim met with the prosecutor's investigator and said he had accidently fallen and the fall had caused his injuries. He further claimed he had tried to contact the district attorney's office, but " 'no one was available.' " (*Ibid.*) The defendant moved to withdraw her plea on the ground "she was unaware that the victim had fundamentally changed his account of the incident" and "her former appointed counsel failed to investigate her case and failed to discover—prior to her plea—that the victim had tried to recant his statements about the incident." (*Id.* at p. 1415.) The Court of Appeal, relying on *Watts*, concluded that while the prosecution's case might have been slightly weaker than it appeared when the defendant pled guilty, that did not invalidate her plea. The appellate court also pointed out the trial court had placed little weight on the victim's recantation, since there was good reason to believe the victim's new account was the product of latent remorse about defendant's having been prosecuted. (*Id.* at pp. 1417–1418.)

Defendant asserts that unlike in *Breslin*, here the manager witness's "concern was not related to the extent of punishment, but rather a fear that she may well have misidentified the actual assailant, thereby bringing punishment down upon the wrong person." (Underscoring omitted.) While it appears the witness lost "confidence in the reliability of her description of the clothing worn by the main assailant," it is also true she had previously expressed concern about naming the wrong assailant as indicated by her repeated emphasis that she could not identify defendant. Indeed, she had even gone so far as to call the defense investigator after their meeting, to reiterate that she could not identify the individual who had the bed frame. Further, defendant knew the witness had seen the fight from far away and had not initially given the police a description of the assailant with the bed frame. Finally, in defense counsel's e-mail to the deputy district attorney, counsel expressed doubts about the witness' reliability, given her prior arrest record.[6]

In sum, on the instant record, the trial court acted well within its discretion in ruling defendant failed to meet his burden to show by clear and convincing evidence that he pled guilty due to mistake, ignorance or some other factor overcoming his exercise of free judgment. (See *Breslin, supra*, 205 Cal.App.4th at p. 1418.)

---

[6] For the first time in his reply brief, defendant asserts "[f]undamental fairness is lacking when the prosecution uses hearsay testimony from a key eyewitness to obtain a holding order, then faults the defendant and discredits the eyewitness when she later attempts to clarify what she actually saw." He contends he "should not be faulted for failing to establish [the witness'] lack of confidence in her description of the assailant's clothing, when it was the prosecution that chose to conduct appellant's preliminary hearing under Prop. 115's exception to traditional hearsay rules. The prosecution's reliance upon Officer Ruggles' testimony to convey [the witness'] observations severely limited counsel's opportunity to challenge what she actually saw, and to probe her degree of certainty regarding the actual assailant." Arguments raised for the first time in a reply brief are deemed waived. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 794.)

Ineffective Assistance of Counsel

Defendant alternatively contends he received ineffective assistance of counsel because his lawyer "failed to timely interview two exculpatory eyewitnesses," namely J.L. and K.M., prior to the plea.

To establish a claim of ineffective assistance of counsel, "the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice. . . . When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

When a claim of ineffective assistance is raised on appeal, " 'the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention must be rejected.' " (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) We will reverse a trial court decision on the ground of ineffective assistance of counsel " 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his [or her] act or omission.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Defendant asserts "[t]here is no plausible reason for counsel not to have interviewed the two eyewitnesses police had identified in their report, before negotiating his guilty plea," citing to *In re Cordero* (1988) 46 Cal.3d 161 (*Cordero*).

In *Cordero*, the Supreme Court reversed the petitioner's conviction for first degree murder on the ground petitioner was prejudiced by his counsel's ineffectiveness. (*Cordero, supra*, 46 Cal.3d at pp. 164–165.) Despite the fact trial counsel had relied "on petitioner's intoxication as the sole theory of his defense," counsel "did virtually nothing to find witnesses capable of corroborating petitioner's intoxication on the night of the killing." (*Id.* at p. 178.) Among other things, counsel failed to investigate references in

the police report that a PCP-laced cigarette was found at the scene of the crime, to adequately confer with the petitioner about his mental state and condition on the night of the killing, and to adequately interview at least seven percipient witnesses. (*Id.* at pp. 181–184.) "While an attorney is not obligated to interview every prospective witness [citation], it is patently incompetent for him to interview none regarding the crux of the anticipated defense—here, petitioner's intoxication." (*Id.* at p. 184.)

Unlike in *Cordero*, defense counsel here did focus on "the crux of the anticipated defense" (*Cordero, supra*, 46 Cal.3d at p. 184), namely the circumstantial nature of the prosecution's case and the weakness of the state's evidence. The defense investigator interviewed the manager witness who had initially identified defendant, but then said she was not certain defendant committed the assault with the bed frame. The police report also identified J.L. and K.M., but it did not indicate either had any material information. It simply stated they had both seen the fight and J.L. had said there were more than six people involved. Nevertheless, in seeking a negotiated disposition, defense counsel readily identified, and in considerable detail, the weaknesses in the prosecution's case. Thus, this is not a case where defense counsel "did virtually nothing." (*Id.* at p. 178.)

In sum, the record reflects a "rational tactical purpose" for defense counsel's handling of the case—to obtain a negotiated disposition whereby defendant would plead to only a single *misdemeanor* charge and receive a probationary sentence, removing the risk of a felony conviction and aggravated sentence. Defense counsel did what was required to make it clear to the prosecutor that the case was based entirely on circumstantial evidence that, itself, was weak and subject to credibility problems.

Given our conclusion that there was a tactical reason for counsel's performance, we need not and do not address the issue of prejudice. (*People v. Zapien, supra*, 4 Cal.4th at p. 980; *People v. Kelly, supra*, 1 Cal.4th at p. 520.)

DISPOSITION

The judgment is affirmed.

_____
Banke, J.

We concur:

_____
Margulies, Acting P.J.

_____
Sanchez, J.

A154089, *People v Mejia*